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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL F. MURRY, Defendant and Appellant.	B183523 (Los Angeles County Super. Ct. No. SA 053445)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed in part; remanded in part.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Lawrence M. Daniels, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Michael Fred Murry is a homeless man who committed crimes against three homeless women, in the beach area of Santa Monica and Venice. He was involved in romances with two of the women, Sherece V. and Nani V., before he attacked them. Sherece and Nani testified at the trial. The third victim, Shasta M., was a 17-year-old girl whom appellant befriended and assaulted, on the same day. A redacted version of Shasta's preliminary hearing testimony was read to the jury, after she was found to be unavailable as a witness.

Appellant contends that admission of Shasta's preliminary hearing testimony violated his Sixth Amendment right of confrontation, under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). He also contends that there were numerous errors in the jury instructions and in his sentence. Respondent concedes one sentencing error. We agree with appellant as to a second sentencing error. We reject appellant's contentions as to guilt, affirm his conviction, but remand for resentencing.

PROCEDURAL HISTORY

As to Shasta, appellant was charged with three counts of forcible rape (counts 1, 2, and 3), and one count of dissuading a witness from testifying (count 5). The jury convicted him of battery and assault (count 1); attempted rape, battery, and assault (count 2); rape (count 3); and dissuading a witness (count 5).

As to Nani, appellant was charged with kidnapping (counts 9 and 12), battery with serious bodily injury (counts 10 and 14), rape (count 11), criminal threats (count 13), and corporal injury to a spouse or cohabitant (count 15). He was convicted of all those charges, except rape.

As to Sherece, appellant was charged with, and convicted of, battery (count 16), and assault by means of force likely to produce great bodily injury (count 17).

Appellant was also charged with, and convicted of, robbing the owner of Rose Market (count 6), and committing petty theft at Rose Market, with a prior petty theft (count 8). He admitted that he had a prior conviction for petty theft.

Appellant's sentence was computed in this manner: The midterm of five years was imposed on count 9, kidnapping, which was selected as the base term. A consecutive sentence of one year eight months (one-third of the midterm) was added for the second kidnapping count, count 12. A full consecutive term of six years was imposed on count 3, rape. A full consecutive term of three years was imposed on count 5, dissuading a witness. Consecutive one-year sentences (one-third of the midterm), were imposed on counts 2, 6, 10, 14, 15, and 17. On count 17, the court added three consecutive years for an enhancement for inflicting great bodily injury. Consecutive terms of eight months (one-third of the midterm) were added on counts 8 and 13.

FACTS

1. Prosecution Evidence

Appellant was 32 years old at the time of the crimes. He met Sherece on the beach in Santa Monica in November 2003. The following month, they become lovers, while temporarily living on the street in Hollywood. They bought alcohol and food with money they made through panhandling. They argued on New Year's Eve because Sherece wanted to take the bus back to Santa Monica, and appellant did not want to go. He also was angry that Sherece would not give him $5 they had made that day. He punched Sherece in the face, knocking her down. He hit her again while she was on the ground. He then left. Sherece was taken to a hospital by ambulance, and treated for a black eye. She then returned to Santa Monica.

Appellant and Sherece soon resumed their relationship. They had another argument on March 8, 2004, because Sherece thought that appellant was too drunk to drive a car. She threw the keys away from the car and started to walk away. Appellant followed her, grabbed her by the hair, hit her in the face, and knocked her to the ground. He then kicked her several times in the head and face. She was again taken by ambulance to a hospital. Her injuries included a broken nose, bruises to her face and ribs, and permanent damage to the vision in one eye.

In July 2004, appellant had a sexual relationship for a few weeks with another homeless woman, Nani. They slept outside around Venice Beach, drank alcohol

together, and used cocaine. Over time, appellant became unreasonably jealous and antagonistic. On July 16, 2004, he became angry with Nani because she accepted a sandwich from a friend. He hit her with his fist on the side of her face, knocking her down. He then dragged and carried her a considerable distance, to a particular stairwell. In the process, he periodically hit her in the face, choked her, and hit her head against the ground. She was dizzy, and her head was bleeding. He would not let her seek medical treatment, and forced her to stay with him in the stairwell.[1] After he fell asleep, she managed to crawl back to friends at the Venice Boardwalk.

Nani stayed with her friends throughout the next day. That evening, she was on the beach, telling police officers what appellant did to her, when she saw him. Frightened, she ran away from the officers. Appellant pulled her away until they were at a location where nobody could see them. He repeatedly struck her in the face. He picked her up by the throat and hit her so hard that she flew about 10 feet through the air. He then choked her into unconsciousness. When she awakened, he was gone. She made a full report and received treatment at a hospital. As with Sherece, her physical injuries matched her description of the crimes.

On August 3, 2004, the third victim, 17-year-old Shasta, was panhandling with her 22-year-old boyfriend, Jeremy, in front of a fast food restaurant. Appellant approached and offered to buy them beer. Shasta had never seen him before. They bought beer and drank it in a hotel room, while playing a game. At some point, Shasta mentioned that the police were paying for the hotel room, because she had reported that she had been molested two nights earlier by a man named "Goldie." Appellant's demeanor changed when Shasta mentioned Goldie.

Appellant and Jeremy left together, to get more beer. Appellant returned to the hotel room, without Jeremy. He went with Shasta to a store, where they purchased a

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[1] Nani testified that appellant forced her to have sex with him in the stairwell. However, the jury found appellant not guilty of raping Nani.

bottle of vodka and a can of beer. They drank vodka on a hill near the hotel. Shasta felt "a little drunk but not really, really drunk."

Shasta agreed to go with appellant to get some cocaine. They walked a short distance, from Santa Monica to Venice. They entered a laundromat and went into its bathroom, through a coin-operated door, to drink the beer. To Shasta's surprise, appellant suddenly choked her, threatened to kill her, and forced her to submit to a sexual assault on the bathroom floor.[2] He told her that she should not have reported Goldie to the police. Afterwards, he forced her to walk with him throughout residential and commercial streets in the area. He continuously kept his hand on her arm. As they walked, they encountered friends of appellant's, a man and a woman. He told them that Shasta was "the girl that turned Goldie in." The female wanted to assault Shasta. Appellant and Shasta turned and walked away.

At some point, appellant and Shasta entered the Rose Market in Venice. The store's owner refused to sell beer to them. Appellant struck the owner in the face, and walked out with a can of beer. While the owner was describing the incident to the police on the telephone, appellant returned, grabbed a 12-pack of beer, and left without paying for it.

Shasta cried, pleaded with appellant to release her, and said she would drop the charges against Goldie. Eventually, about two hours after the bathroom incident, he pulled her into the carport of an alley. He forced her to take off her pants and lie down on the ground behind a car. He raped her and choked her. She was crying loudly, so he hit her across the face.

After the carport incident, appellant forced Shasta to continue walking with him. They happened to encounter a male friend of hers. Shasta held onto her friend and asked

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[2] Shasta testified that appellant raped her twice in the bathroom, before and after she used the toilet, and later raped her a third time, in a carport. The prosecutor argued to the jury that there were two rapes in the bathroom and one in the carport. However, the jury found appellant guilty of lesser included offenses, and not rape, on counts 1 and 2. The sole rape conviction, count 3, was apparently based on the carport incident.

him to help her. Appellant grabbed her from behind, put his arm around her neck, and tried to pull her away. Her friend pushed appellant. As soon as appellant's arm was off of her, Shasta ran towards the police station. She immediately reported the crimes, and received medical treatment. The police arrested appellant, whom they found sleeping in a nearby alley.

Shasta's injuries included a black eye, abrasions, bruises, and tenderness to her face, body, and pelvic area. There was physical evidence in the bathroom and at the carport that was consistent with details she provided. Finally, there were videotapes from surveillance cameras that showed appellant and Shasta were at the laundromat and at the market.

2. Defense Evidence

Appellant testified in his own defense. He denied having nonconsensual sex with any of the women, and said he did not know how they were injured. He admitted only that he had consensual sex with Shasta in a bathroom, stole a beer from the Rose Market without violence, and struck Sherece one time.

DISCUSSION

1. Admission of Shasta's Preliminary Hearing Testimony

The Sixth Amendment's right of confrontation bars the use of out-of-court testimonial hearsay, unless the witness is unavailable and the defendant had a previous opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. 36, 59, 61, 68.)

Appellant does not dispute the trial court's finding that Shasta was unavailable. He maintains that her preliminary hearing testimony was inadmissible because he could not fully and effectively cross-examine her at the preliminary hearing, due to limitations that were placed on cross-examination. The record compels a contrary conclusion.

At the preliminary hearing, appellant's counsel pointed out that Shasta was a homeless person who might not be available at the trial. Because of that risk, the trial court permitted extensive cross-examination of Shasta, not only as to her description of

what appellant did, but also as to her accusation against Goldie, two days earlier.[3] The court also permitted cross-examination about an accusation Shasta had made against her stepfather, when she was 12 years old. Shasta complained about having to discuss that incident, but admitted that she had lied, because she did not like her stepfather. She also said that the accusation against her stepfather was her only false accusation, and she had never received a benefit for making an accusation, except for the short hotel stay after reporting Goldie.

At appellant's trial, the jury heard Shasta's direct examination and her cross-examination about what happened with appellant, Goldie, and the stepfather. The only thing it did not learn about was a third accusation, involving an incident at a playground. At the preliminary hearing, after discussing the other incidents, Shasta adamantly refused to answer any questions about the playground incident. Defense counsel made this offer of proof: When Shasta was 13 or 14 years old, she snuck out of the house, smoked methamphetamine, had sex with a group of men at a playground, and later made a complaint of rape. The court precluded questioning about this third accusation because Shasta refused to discuss it and the evidence would not be admissible at trial.

Given the detailed cross-examination that had already occurred regarding the other incidents, the trial court properly foreclosed inquiry into the playground incident. The jury heard Shasta's cross-examination regarding what happened with appellant, with Goldie, and with her stepfather. Appellant had a motive and an opportunity to cross-examine Shasta at the preliminary hearing regarding the pertinent evidence, and fully utilized that opportunity. (See *People v. Smith* (2003) 30 Cal.4th 581, 611.) There was no *Crawford* error.

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[3] According to Shasta, she and her boyfriend were in one bed of a hotel room, and Goldie was in the other, as they were sharing the cost of the room. She was naked under the covers. She awakened to discover that Goldie was rubbing his private parts against hers. The next day, she reported what Goldie did to the police.

2. Attempted Rape Instruction

On count 2, appellant was charged with rape, but was convicted of attempted rape, simple battery, and simple assault. He maintains that the attempted rape conviction must be reversed because the jury received conflicting instructions on the requisite mental state.

"[A]ttempted rape, a specific intent crime, is a lesser included offense of rape, a general intent crime." (*People v. Atkins* (2001) 25 Cal.4th 76, 88.) The record shows that the jury was erroneously instructed that attempted rape is a general intent crime, and correctly instructed that attempt crimes require specific intent.

The information alleged many different crimes, so numerous lesser included offenses were possible. The instructions contained a long list of crimes, which required a union of act and general intent, and a similar list of crimes for which a union of act and specific intent was necessary. (CALJIC Nos. 3.30 and 3.31.) Attempted rape was improperly included in the list of general intent crimes.

Similarly, the instruction on voluntary intoxication (CALJIC No. 4.21.1) erroneously included attempted rape in the list of crimes for which voluntary intoxication was not a defense. Attempted rape should have been included in the list of specific intent crimes for which intoxication was to be considered, in determining whether or not appellant had specific intent.

Later in the instructions, the jury received a long list of possible lesser offenses for each count. (CALJIC No. 17.10.) Attempted rape was named as one of the possible lesser offenses for the rapes in counts 1, 2, and 3. After the list, the jury was given CALJIC No. 6.00, which includes this definition of "attempt": "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."

The record therefore shows that the jury received conflicting instructions about whether attempted rape required specific intent or general intent. However, the error was harmless, because "the nature of the acts done by the accused preclude belief that they were done without specific intent." (*People v. Hill* (1967) 67 Cal.2d 105, 119.) Shasta

testified that when she was in the bathroom with appellant, he choked her so that she could not breathe, threatened to kill her, and raped her on the floor. He let her get up temporarily to use the toilet, pulled her off the toilet as she was defecating, and raped her again on the floor. Afterwards, her physical injuries were consistent with rape and choking, and there was feces on the floor and wall of the bathroom. The nature of appellant's actions therefore precluded a finding that he acted without specific intent.

Moreover, the guilty verdict on count 5 establishes that the jury decided the issue of voluntary intoxication adversely to appellant. Count 5 alleged that appellant dissuaded Shasta from testifying, by force or threat (Pen. Code, § 136.1, subd. (c)(1).)[4] The crimes in counts 2 and counts 5 were part of the same incident. Shasta testified that while appellant was raping her in the bathroom, he told her that she should not have reported that his friend Goldie had molested her. Appellant was equally intoxicated as to counts 2 and 5, if he was intoxicated at all. The jury was told that count 5 involved a specific intent crime, and evidence of intoxication should be considered in deciding whether appellant had the requisite specific intent. Thus, the guilty verdict on count 5 means that, if the jury had been properly instructed that intoxication was a defense to the crime on count 2, it still would have returned a guilty verdict on count 2.

3. The Kidnapping Instruction

Appellant maintains that the two counts of kidnapping Nani (counts 9 and 12) must be reversed because the trial court failed to properly instruct on the elements of kidnapping (§ 207, subd. (a)). We do not agree. The jury learned the elements of kidnapping via CALJIC No. 9.50. That instruction is a correct statement of the applicable principles, as set forth by our Supreme Court in *People v. Martinez* (1999) 20 Cal.4th 225, 236-238.

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4 All subsequent code references are to the Penal Code, unless otherwise stated.

4. The Great Bodily Injury Instruction

Count 17 alleged that, for the victim Sherece, appellant committed an assault by means of force likely to produce great bodily injury. (§ 245, subd. (a)(1).) That count also had an allegation of personal infliction of great bodily injury, pursuant to section 12022.7, subdivision (a) (section 12022.7(a)).[5]

As to the section 12022.7 enhancement, the jury received CALJIC No. 17.20. Appellant complains that CALJIC No. 17.20 does not mention the enhancement's requisite mental state, which is general criminal intent. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167.) However, the jury necessarily found the requisite general criminal intent, when it found appellant guilty of the crime in count 17, assault by means of force likely to produce great bodily injury. For that offense, it was instructed that it had to find "great bodily injury," which meant "significant or substantial bodily injury or damage," as opposed to "trivial or insignificant injury or moderate harm." From CALJIC No. 17.20, the jury heard that, if it found appellant guilty on count 17, it had to decide whether the enhancement was true, based on whether the injuries were "significant or substantial," rather than "[m]inor, trivial or moderate." By finding appellant guilty on count 17, the jury found that he acted with general intent when he committed great bodily injury. There was therefore no need to repeat the general intent requirement in the instruction for the great bodily injury enhancement.

5. Imposition of the Full Consecutive Term on Count 5

On count 5, appellant was convicted of attempting to dissuade a witness by force or fear. (§ 136.1, subd. (c)(1).) He received a full midterm consecutive sentence of three years, rather than the more usual consecutive sentence of one-third of the midterm, due to the alternative sentencing provisions of section 1170.15. He maintains that the

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[5] Section 12022.7(a) states: "(a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

requirements of section 1170.15 were not met, because he was not convicted of a felony, which was the source of his dissuading activity. The contention has merit.

Section 1170.15 states, in pertinent part:

"Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, . . . the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed . . . ."

By its terms, section 1170.15 provides for a consecutive penalty of the full middle term, rather than one-third of the middle term, if the defendant was "convicted of a felony," and additionally convicted of violating section 136.1, if the violation of section 136.1 "was committed against the victim of . . . the first felony." (See 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 313, p. 405.)

In finding section 1170.15 to be applicable, the trial court reasoned that appellant had been convicted of rape and attempted rape as to Shasta, either of which would qualify as the "underlying felony" relating to Shasta, and Shasta was also the witness whom appellant dissuaded by force, in violation of section 136.1.

Appellant reads the statute differently. He maintains that the full term under section 1170.15 could only be imposed if the "first felony" to which the statute refers was the source of the witness dissuasion. Under appellant's theory, Goldie's purported molestation of Shasta was the "first felony," so the elements of section 1170.15 were not established, since it was Goldie and not appellant who committed that first felony.

For analytic purposes, there is some confusion regarding the behavior that underlies count 5.

The applicable jury instruction asked the jury to decide whether a person attempted to persuade Shasta either (a) not to report to a peace officer that she was a victim, or (b) not to seek the arrest of any person in connection with her victimization.

The prosecutor's argument did not specifically mention count 5, but included numerous facts about the Goldie incident, including Shasta's conversation with Jeremy in the hotel room about Goldie; appellant's saying to Shasta in the bathroom, "You shouldn't have done that to Goldie"; Shasta's belief that appellant was retaliating against her because she reported Goldie; and Shasta's offer to drop the charges against Goldie if appellant released her. It therefore appears from the record that the People relied below on the Goldie incident, for count 5. However, respondent's briefing maintains that count 5 was based on appellant's attempt to pull Shasta away from her friend, just before she escaped from appellant. The prosecutor's summary of the evidence briefly mentioned appellant's attempt to pull Shasta back, but not with the emphasis that was placed on the evidence regarding Goldie. We conclude that appellant's dissuasion of Shasta related to the complaint that Shasta had made about Goldie.

A sentence for dissuasion "quite obviously cannot run fully consecutively to an underlying offense for which the defendant was not convicted." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1835.) Appellant was convicted of other felonies against Shasta, but he was not convicted of the crime that Goldie allegedly committed, which was the underlying offense for witness dissuasion. Therefore, section 1170.15 was inapplicable, and appellant should have received a one-year term, rather than a three-year term, on count 5.

6. Section 654 As to Counts 14 and 15

Nani was the victim of counts 14 and 15. Count 14 alleged battery with serious bodily injury. (§ 243, subd. (d).) Count 15 alleged corporal injury to a spouse or cohabitant. (§ 273.5, subd. (a).) Appellant's sentence includes consecutive one-year terms on both counts. He maintains that there could be only one such term, because section 654 bars an act from being punished under more than one provision. We reject the contention. Nani described numerous violent crimes, on two consecutive nights. The

prosecutor's argument explained which acts of appellant applied to different counts. Appellant was not punished twice for the same act.

7. Due Process As to Counts 14 and 15

Appellant further argues that his separate sentences on counts 14 and 15 violates the Fourteenth Amendment of the United States Constitution and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), because the jury's verdicts on those counts do not reflect findings that the counts were based upon separate acts. There was no due process violation because, based on the evidence and the prosecutor's argument, the jury returned a guilty verdict on different counts, based on different acts.

8. Conceded Sentencing Error on the Section 12022.7 Enhancement

On count 17, the trial court imposed a consecutive term of three years for the section 12022.7 enhancement. Appellant and respondent agree that the appropriate consecutive sentence for the enhancement was one year (one-third of the midterm), rather than three years. (§ 1170.1, subd. (a); *People v. Felix* (2000) 22 Cal.4th 651, 655.) We therefore find error in that aspect of appellant's sentence.

The circumstances justify a remand for resentencing.

At the sentencing hearing, the judge observed that there were circumstances in aggravation and none in mitigation. She thought that appellant did not appreciate the terror to which he subjected his victims, and noted that he had "received a break" when he was not convicted of raping Nani, as convictions for raping multiple victims would have resulted in a possible life sentence. In her opinion, appellant had committed "a series of incredibly violent, callous, vicious acts against separate women." The evidence justifies that characterization of the crimes.

Our conclusions about sentencing errors on counts 5 and 17 result in the subtraction of four years from appellant's sentence. Upon remand, the trial court may choose to compute appellant's sentence in a different manner, as long as the new aggregate term does not exceed the original aggregate term, 27 years. (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.) We leave that matter to the sound discretion of the trial court.

9. **Blakely *Error***

Finally, to preserve the issue for future federal review, appellant argues that imposition of consecutive sentences based on facts that were neither found true by the jury nor admitted by him violated his Sixth Amendment right to a jury trial, under *Blakely*, *supra*, 542 U.S. 296. The contention was rejected in *People v. Black* (2005) 35 Cal.4th 1238, 1262-1264, which we follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

Appellant's conviction is affirmed. The case is remanded for resentencing, in accordance with the views expressed herein.

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FLIER, J.

We concur:

COOPER, P. J.

BOLAND, J.